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UNITED STATES COURT OF APPEALS
For the First Circuit

Nos 97-1648 and 97-1649

MANUEL A. IGLESIAS,
Plaintiff, Appellant/Cross Appellee.

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant, Appellant/Cross Appellee.

Before

TORRUELLA, Chief Judge,
CAMPBELL, Senior Circuit Judge,
and STALL, Circuit Judge.

ORDER OF COURT

ENTERED: November 19, 1998

The petitions for rehearing filed in the above captioned appeals are denied.

By the Court:

PHOEBE MORSE, CLERK

[cc: Ms. Doyle, Ms. de Jesús Morales, Messrs. Hey-Maestre, Roldán Burgos and Maldonado Nieves]

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 97-1648

MANUEL A. IGLESIAS,
Plaintiff, Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Defendant, Appellee.

No. 97-1649

MANUEL A. IGLESIAS,
Plaintiff, Appellee,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Defendant, Appellant

ERRATA SHEET

The opinion of this Court issued on September 17, 1998 is amended as follows:

Add the following sentence to the end of the opinion:

"Costs awarder to MONY on the appeal form the district court's grant of summary judgment; each party to bear its own costs on the appeal from the dismissal of the counterclaim".

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 97-1648

MANUEL A. IGLESIAS,
Plaintiff, Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Defendant, Appellee.

No. 97-1649

MANUEL A. IGLESIAS,
Plaintiff, Appellee,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Defendant, Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Raymond L. Acosta, Senior U. S. District Judge]

Before

Torruella, Chief Judge,
Campbell, Senior Judge,
and Stall, Circuit Judge.

Charles S. Hey-Maestre, with whom Adalina de Jesús-Morales was on brief for Manuel A. Iglesias.

Roberto O. Maldonado-Nieves, was on brief for Mutual Life Insurance Company of New York.

September 17, 1998

CAMPBELL, Senior Circuit Judge. Manuel A. Iglesias appeals from the district court's grant of summary judgment on his discrimination and contract claims against his former employer, Mutual Life Insurance Company of New York ("MONY"). MONY appeals from the court's dismissal of its counterclaim for restitution of money that Iglesias obtained by submitting admittedly overstated expense reports. We affirm the judgment for MONY against Iglesias. We vacate the order dismissing MONY's counterclaim and remand the counterclaim with directions to dismiss the counterclaim without prejudice to dismiss the counterclaims without prejudice for want of jurisdiction.

I. Iglesias's Claims.

We review a grant of summary judgment de novo, taking the facts in the light most favorable to the non-moving party. See One Nat'l Bank v. Antonellis, 80 F.3d 606, 608 (1st Cir. 1996). After considering the record, briefs, and oral arguments, we affirm the dismissal of Iglesias's discrimination and contract claims substantially for the reasons stated in the district court's memoranda and orders. We add only the following short discussion.

Regarding Iglesias's discrimination claims,[1] Iglesias received clear and unequivocal notice that he was terminated as MONY's San Jose Agency Manager on February 9, 1989, at the latest. On that date, MONY sent him a letter informing him that he would no longer be authorized to act as Agency Manager. In the context of the parties' prior discussions regarding Iglesias's retirement, the February 1989 letter put Iglesias on notice that he

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[1]Iglesias sued for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et. seq. (1985); and Law 100 of June 30, 1959, P.R. Law Ann. Tit. 29, § 146 (1985).

had been fired.[2] Iglesias did not file administrative charges with the Anti-Discrimination Division of Puerto Rico Department of Labor until August 28, 1990, and his initial complaint in federal court discrimination was, therefore, barred by the applicable statutes of limitations. See 42 U.S.C. § 2000e-5 (e) (establishing 300-day limitation period for actions under Title VII that were first presented to an administrative agency); 29 U.S.C. § 626(d) (2) (setting 300-day limitation period for actions under the ADEA that were first brought before a state authority); Olmo v. Young & Rubicam, 110 D.P.R. 740, 745 (P.R. 1981) (applying a one year limitation period to claims brought under Law 100). The Puerto Rico Supreme Court's decision in Vélez Rodríguez v. Pueblo Int'l Inc., 94 JTS 37 (P.R. March 18, 1994) does not apply to Iglesias's claims for the reasons stated in the district court's memorandum.

Regarding Iglesias's contract claims, MONY's employment contract with Iglesias did not limit MONY's ability to withdraw products from the Puerto Rico market. Iglesias argues that the provision in the contract authorizing him to "solicit applications for insurance in MONY of the types of insurance which MONY is issuing" created a vested right that prevented MONY from ever altering its policy offerings in Puerto Rico. We recognize that "when the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences a the summary judgment state." Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995). We need not indulge a nonmoving party's inferences, however, if they do not "flow rationally form the underlying facts." Rubinovitz v. Rogato, 60 F.3d 906, 911 (1st Cir. 1995).

---

[2]According to Iglesias, a MONY manager had told him in 1988: "Either you retire or I'll retire you." At trial, Iglesias said that he did not respond to the February 9, 1989 letter from MONY because he "felt humiliated by what (MONY) was offering me because [MONY] was firing me." Thus, Iglesias was aware that he was being terminated in early 1989.

No reasonable jury could agree with Iglesias's reading of his contract. The plain language of the provision purports only to authorize Iglesias to sell MONY's product line, it does not guarantee stability of that line. MONY is a national company that deal with many agents in diverse geographic areas. To interpret this contract provision so as to grant each of those agents the power to control which products MONY offers within that particular agent's jurisdiction would give Iglesias and other agents the power to veto policy decisions made by MONY's upper management at the company's national headquarters. This would flip the employment relationship between MONY and its agents on its head. Further, each of Iglesias's contracts contained clauses in which MONY reserved the right to change the contract. The district court's grant of summary judgment was entirely appropriate.

II. MONY's Counterclaim.

MONY reimbursed Iglesias for expenses that he incurred as a result of his professional activities. To supplement his income, Iglesias admit that he "padded" his expense reimbursement requests from 1981 to 1988. MONY first learned of Iglesias's practice of overstating his expenses in 1987. At that time, MONY took no legal action against Iglesias. Instead, after notifying him that his conduct conflicted with company policy, MONY requested that he submit accurate reports in the future. Subsequently, Iglesias brought the present action against MONY for discrimination and breach of contract. On November, 1991, in the course of a deposition, Iglesias admitted that he had continued submitting exaggerated expense reports even after MONY's 1987 warning.

MONY tried to used the information obtained at the 1991 deposition in three ways. First, MONY questioned Iglesias about his expense reports during trial in an effort to impeach his credibility. Second, MONY attempted to raise the falsified expense requests as an affirmative defense to Iglesias's discrimination claims, arguing that they provided MONY with

a valid non-discriminatory reason to terminate Iglesias. The court did not allow MONY to pursue this strategy because MONY learned of these improprieties only after it had terminated Iglesias.

Third, and more importantly for our purposes, MONY sought leave to amend its answer to add a counterclaim for restitution. On March 17, 1992, the magistrate judge granted MONY's request. For four years, the parties conducted discovery on the counterclaim. On August 6, 1996, Iglesias moved for dismissal of MONY's counterclaim arguing, inter alia, that it was barred by laches. On August 14, 1996, the district court dismissed the counterclaim as untimely. MONY now appeals from that dismissal.

Although neither of the parties has raised the issue, we have an obligation to inquire into our subject matter jurisdiction over MONY's counterclaim. See Clark v. Paul Gray, Inc., 306 U.S. 583, 588 (1939) (holding that although district court's jurisdiction had not been challenged, Court had duty to raise question of whether jurisdictional amount was involved). See also White v. Gittens, 121 F.3d 803, 806 (1st Cir. 1997). Federal courts are courts of limited jurisdiction; a court may not address the merits until "after . . . the court has assumed jurisdiction over the controversy." Bell v. Hood, 327 U.S. 678, 681 (1946); see also Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1012 (1998) (stating that deciding the merits before confirming jurisdiction "carries the court beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers"). Since MONY's counterclaim sounds in state law, a federal court many not hear it unless it falls within the ambit of supplemental jurisdiction or is supported by an independent jurisdictional basis. See Toste Farm Corp. v. Hadbury, Inc., 70 F.3d 640, 646 (1st Cir. 1995) (noting that a federal court has jurisdiction over a counterclaim only if its resides withing the court's supplemental jurisdiction or is supported by an independent jurisdictional basis).

The parties appear to have assumed that MONY's counterclaim was withing the court's supplemental jurisdiction. When considering supplemental jurisdiction, the nature of the counterclaim is crucial. Federal Rule of Civil Procedure 13 describes two types of counterclaims: compulsory and permissive. A compulsory counterclaim is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a). All counterclaims that are not compulsory are permissive. See Fed. R. Civ. P. 13(b). Only compulsory counterclaims can rely upon supplemental jurisdiction; permissive counterclaims require their own jurisdictional basis.

The supplemental jurisdiction statue provides: "[I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Section 1367 incorporates the common law doctrines of pendent and ancillary jurisdiction. See Penobscot Indian Nation v. Key Bank, 112 F.3d 538, 563 (1st Cir.), cert. denied, 118 S. Ct. 297 (1997). Federal courts have ancillary jurisdiction over compulsory counterclaims. See McCaffrey v. Rex Motor Transp., Inc., 672 F.2d 246, 248 (1st Cir. 1982); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure §1414, at 99 (2d ed. 1990). Permissive counterclaims, however, do not fall withing ancillary jurisdiction and therefore may not be heard in federal court unless supported by and independent basis of jurisdiction. See McCaffrey, 672 F. 2d at 248; Wright, et. al., § 1422, at 169-70.

There are at least four tests to determine whether a counterclaim is compulsory or permissive:

1) Are the issues of fact and law raised by the claim and counterclaim largely the same?

> 2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
>
> 3) Is there any logical relation between the claim and the counterclaim?

McCaffrey, 672 F.2d at 248 (quoting 6 Wright et. al., supra, § 1410, at 42 [currently 52-57]) (internal quotation marks omitted). Of these tests, only the fourth - the "logical relation" test - could possibly encompass MONY's counterclaim. In McCaffrey, we adopted the Fifth Circuit's treatment of the logical relation test. Under this approach, a claim qualifies as compulsory only if:

> it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claims rests activates additional legal rights in a party defendant that would otherwise remain dormant.

McCaffrey, 672 F.2d. at 249 (quoting Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d. 709, 715 (Th Cir. 1970).

Applying this standard, MONY's counterclaim is permissive. First, the aggregate of operative facts giving rise to Iglesias's claims is entirely different from the facts supporting MONY's counterclaim. Iglesias alleges that MONY removed its disability insurance product from the Puerto Rico market in 1981 for discriminatory reasons. That change in policy, he claims, led to his eventual termination, which therefore was also discriminatory. The evidence relevant to these claims includes the terms of Iglesias's employment contract and documentary, testimonial or other evidence concerning MONY's actions in Puerto Rico. By contrast, MONY's counterclaim is for restitution of monies that Iglesias wrongfully obtained from the company over the period from 1981 to 1988. The facts

supporting the restitution claim include Iglesias's records and expense vouchers for travel and meals, his admissions during deposition, and documentary, testimonial or other evidence regarding MONY's reimbursement policies. Notwithstanding both claims arose during the same time period, they therefore rest on different sets of supporting facts.

Second, MONY's ability to recover restitution does not depend on the success or failure of Iglesias's claims. Iglesias has admitted that he overbilled his expenses to enhance his compensation. Although MONY discovered Iglesias's false reimbursement requests for 1988 in a deposition that was part of the present action, Iglesias's claims did not "activate" otherwise dormant claim. MONY could have sought reimbursement for its payments based on Iglesias's false expense reports prior to 1988 at any point. Even MONY's claim relating to 1988 expenses is no tied to the merits of the discrimination and contract claims. In other words, MONY's counterclaim bears no logical relation to the claims in the main action.

We conclude that MONY's counterclaim is permissive rather than compulsory, and is not supported by federal supplemental jurisdiction. We look, therefore, to whether it rests on an independent federal jurisdiction basis.

The only possible jurisdiction basis would be diversity of citizenship. While Iglesias and MONY are citizens of different states, MONY did not allege that its claim exceeded any specified sum, nor is its amount ascertainable form the record. See 28 U.S.C. § 1332(a) (1993) (limiting diversity jurisdiction to claims that exceed a certain amount-in-controversy). At the time that MONY asserted its counterclaim, the amount-in-controversy required was in excess of $50,000, exclusive of interest and costs.[3] The burden of alleging jurisdiction is on the party asserting the

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[3]After MONY asserted its counterclaim, § 1332(a) was amended to require an amount-in-controversy greater than $75,000. See Pub. L. No.

claim. See Viquiera v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998) (stating that "the proponent . . . must carry the burden of demonstrating the existence of federal jurisdiction").

Although "the sum claimed by the [proponent] controls if the claim is apparently made in good faith," Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938) (footnote omitted), MONY, as noted, has failed to allege that its counterclaim exceeds the required amount-in-controversy nor is there evidence in the record from which its value can reliably be determined as exceeding that amount. MONY stated merely that it was:

> in the process of reviewing each and everyone [sic] of the expense reports submitted by Mr. Iglesias to determine what was the scope of this practice by Mr. Iglesias and the approximate amount of funds wrongfully taken by Mr. Iglesias from Mutual through the scheme of false expense reports acknowledged by the plaintiff.

Later, MONY submitted a more detailed accounting of specific instances in which Iglesias alleged excessive or false mileage, but did not state the value of the wrongful claims. MONY noted that Iglesias had charged $48,500.87 in meal expenses between 1981 and 1988, but it did not indicate what portion of these claims was false or overstated.

In these circumstances - lacking MONY's allegation that the counterclaim meets the jurisdictional amount, and lacking facts of record indicative that this is so - we must conclude that the district court was without jurisdiction to proceed. We, therefore, remand the counterclaim with directions that it be dismissed for want of jurisdiction. See Fed. R. Civ. P. 12(h) (3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court

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104-317, § 205(a) (1) (1996).

shall dismiss the action.") See also United Food & Com. Workers Union v. Centermark Properties Meridien Square, Inc., 30 F.3d 298, 306 (d. Cir. 1994) (addressing for first time on appeal whether district court lacked subject matter jurisdiction and remanding for determination of whether amount in controversy requirement had been met).

We recognized that Iglesias never pointed out below the absence of a proper amount-in-controversy allegation, nor was the subject raise by anyone. Had it been raised, MONY might have been able to remedy the deficiency by amendment if it believed in good faith that its counterclaim exceeded the jurisdictional minimum. In these circumstances, the dismissal we now order shall be without prejudice to MONY's right, if it can do so in good faith, to amend the counterclaim withing such time as the district court allows so as to allege a supportable proper jurisdictional amount.[4] If MONY can do so, the district court may lift the jurisdictional bar. Cf. United Food, 30 F.3d at 306. If that occurs, the court will be faced with whether to reinstate its previous dismissal with prejudice for untimeliness. We comment briefly.

Because jurisdiction over the counterclaim has not been established, we are without authority to rule whether the district court's dismissal for untimeliness was proper. Cf. Steel Co., 118 S. Ct. at 1012. The issue was, however, presented in this appeal and we believe it would be helpful if we were to state our initial impressions, recognizing their present non-binding character. MONY brought its counterclaim only four month after Iglesias's November 7, 1991 deposition revealing for the first time that he had continued to falsify his expenses even after similar improprieties were noted in 1987. In all the circumstances, it is not readily apparent why MONY

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[4]A cursory examination leaves it unclear that the applicable amount can be asserted in good faith, but we leave that issue to MONY and the district court in the first instance.

should be thought tardy in bringing the counterclaim when it did.

Iglesias argues that the counterclaim is barred by laches. The equitable doctrine of laches allows a court to dismiss a claim "where a party's delay in bringing suit was (1) unreasonable, and (2) resulted in prejudice to the opposing party." K-Mart Corp. v. Oriental Plaza, Inc., 875 2d. 907, 911 (1st Cir. 1989). Even if we were to find unreasonable delay within the period between 1987, when MONY first learned that Iglesias has been padded expenses, and 1992, when, after having warned Iglesias earlier, MONY asserted its counterclaim based on the subsequent defalcations, we fail to see how any of that delay prejudiced Iglesias. Indeed, such prejudice as there was appears to have worked the other way. The magistrate judge had granted permission to MONY to assert its counterclaim, and the parties thereafter conducted four years of discovery. MONY sifted through receipts for meals and business trips in and effort to reveal false claims. The court's dismissal after four years of discovery had been allowed seems to work a hardship on MONY. Given these equities, we would have serious questions as to the strength of Iglesias's laches argument.

The judgment for MONY against Iglesias is affirmed. The order dismissing the counterclaim for untimeliness is vacated and the counterclaim remanded with directions to dismiss the counterclaim without prejudice for want of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

****

FINAL JUDGMENT

The Stipulation of Voluntary Dismissal . . . filed by the parties on April 7, 1997 is hereby **GRANTED**.

Accordingly, it is hereby ORDERED AND ADJUDGED that plaintiffs causes of action against defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK which arise under Law 80 of Puerto Rico, 29 L.P.R.A. §§ 185a et seq., and under Section 1981 of the Civil Rights Act, 42 U.S.C. § 1981, contained in the Amended Complaint be and the same are hereby **DISMISSED WITH PREJUDICE** pursuant to Rule 41(a) (1) (ii) Fed. R. Civ. P.

It is further ORDERED AND ADJUDGED that the dismissal shall be without any imposition of costs or fees to either party.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 7th day of April, 1997.

RAYMOND L. ACOSTA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

****

VERDICT FORM

WE, THE JURY FIND THAT:

(CHECK ONLY **ONE** OF THE FOLLOWING)

___ PLAINTIFF VOLUNTARILY RETIRED AS AGENCY MANAGER OF MUTUAL OF NEW YORK IN PUERTO RICO.

_X_ DEFENDANT DISMISSED OR OTHERWISE CAUSE PLAINTIFF'S INVOLUNTARY RETIREMENT FROM HIS EMPLOYMENT AS AGENCY MANAGER OF MUTUAL OF NEW YORK IN PUERTO RICO.

_____ _____

FOREPERSON DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

****

ORDER IN THE MATTER OF PLAINTIFF'S RULE 60(b) REQUEST, DEFENDANT'S JURISDICTIONAL AMOUNT ARGUMENT AND IN THE MATTER OF CONTRACT CLAIM

BACKGROUND

Plaintiff instituted these proceedings challenging his employer's decision to discontinue marketing certain noncancellable disability insurance policies and claiming dismissal from employment in violation of both federal and local provisions. In our Order in the Matter of Report and Recommendation filed on July 1, 1994 (docket No. **85**) we dismissed all discrimination claims as time-barred but reserved for trial the unjust dismissal claim under Law 80 of May 30, 1976, P.R. Laws Ann. tit. 9, §§ 185(a) et seq. (1985) as well as the breach of contract action.

Plaintiff has moved for reconsideration of our ruling dismissing the discrimination claims and in the alternative, certification of the partial

judgment under Rule 54(b) Fed. R. Civ. P. Defendant, on the other hand, has challenged the jurisdictional amount as well as the soundness of the contract claim. These motions will be addressed in a consolidated fashion for easier reference due to overlapping facts.

RULE 60(b) REQUEST

Timeliness

Plaintiff has moved the Court to reconsider its prior dismissal of the discrimination claims asserted pursuant to P.R. Law Ann. tit. 29, § 146 (1985), Law 100 of June 30, 1959; 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 1981 and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (ADEA) as time-barred. See Partial Judgment filed on July 1, 1994 (docket No. 87).

The provisions of Rule 60 (b) Fed. R. Civ. P. are limited to petitions to vacate final judgments.

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party ... from a final judgment ... for the following reasons .... (underline ours).

Since the judgment previously issued in this case did not dispose of all claims, it was not final absent a specific finding of finality under Rule 54(b) Fed. R. Civ. P.[1] which was not made. Further prior to a final

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[1]Rule 54(b) Fed. R. Civ. P. reads:

> (b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one

judgment being entered, courts have the inherent authority to reconsider rulings issued throughout the proceedings. Thus, plaintiff's motion was timely made and we may entertain his arguments.

Accrual

Plaintiff alleges that the statue of limitations for the discrimination claims did not begin to run until after he was denied reinstatement upon the cessation of his disability. In support thereof, he cites Vélez Rodríguez v. Pueblo Int'l, Inc., 94 JTS 37 (March 18, 1994) which was decided after the issue had been briefed by the parties and the motions were under advisement.

In Vélez Rodríguez, plaintiff sought reinstatement to his previous employment upon recovery from his work-related condition. The Puerto Rico Supreme Court held that the applicable limitations period for an action based on failure to reinstate under the P.R. Workmen's Compensation Act, P.R. Laws Ann. tit. 11, § 7 (1977) was three (3) years. Further, it ruled that the claim accrued upon denial of reinstatement which denial the Court found was tantamount to a dismissal.

> or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order ... however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims ... and the order or other form of decision is subject to revision at any time before the entry of judgment adjudication all the claims and rights and liabilities of all parties. (underlined ours)

The situation in the Vélez Rodríguez case however, is distinguishable. For purposes of the statute of limitations, the dismissal in that case occurred when reinstatement was denied since there is a specific provision in the Workmen's Compensation statute which mandates employers to reserve the position to employees disabled as a result of a work-related injuries and to reinstate them once the disability ceases. See P.R. Laws Ann. tit. 11 § (1977). That ruling respond to the particular nature of the Workmen's Compensation Act which provides a more extensive application in that it seeks to secure employment as opposed to providing for economic protection. Vélez Rodríguez, 94 JTS 37 at 11689. No similar provision exists under any of the statutes listed in the complaint nor has plaintiff pointed to any legal grounds for safeguarding his position while receiving disability benefits under the insurance plan provided by his employer.

Thus, we find that there is no basis for finding that the discrimination claims were somehow tolled during the period plaintiff was receiving disability insurance benefits and that the actions accrued when he reapplied for his manager position.

Additionally, plaintiff contends that he never agreed to retire or resign prior to his disability and that the notice for purposes of the limitations period was the rejection of his petition for reinstatement. However, we find that the question is better addressed by the unequivocal intention of the employer which was clear and final and made known to MR. IGLESIAS both prior and shortly after he went on disability status. The sequence of events leading to the alleged "forced retirement" clearly establishes that at the time plaintiff went on disability he had already been clearly notified of the employer's final decision to terminate his services which decision was further confirmed while he was receiving disability benefits.

The following uncontested facts were previously related in our Order in the Matter of Report and Recommendation:

1. At a meeting held in **October 1988**, MR. ROBERT H. KRAMER advised plaintiff that he had the option of voluntarily retiring from MONY or otherwise he would be retired. (Plaintiff's depo. Tr. 61-71, Exh. I, docket No. **22**)

2. Plaintiff requested disability benefits due to his back condition in **December 28, 1988**. (Plaintiff's depo. Tr. 61, 67-68, Exh. I, docket No. **22**)

3. In a letter dated **December 28, 1988**, MR. ROBERT H. KRAMER advised plaintiff of the details concerning his "early retirement" with the particular payment terms. Additionally, the letter made reference to the specific date when his employment with MONY would cease. In pertinent part it read: "[y]our last day at work will be **February 1, 1989**".[2] (Exh. VII, docket No. **14**)

4. Plaintiff's claim for temporary disability benefits was approved on **January 25, 1989**. (Plaintiff's depo. Tr. 67-68, Exh. I, docket No. **22**)

5. In a letter addressed to plaintiff dated **February 9, 1989** MR. KRAMER stated "you should file your early retirement papers so that as soon as you come off disability you will go straight into early retirement". Plaintiff was further admonished that he would "no longer be authorized to sign-off or act as Manager." (Exh. IX, docket No. **14**)

6. In a letter dated **May 8, 1990** plaintiff was advised that his disability income benefits has ceased due to the improvement in his back condition. (Exh. X, docket No. **14**)

---

[2]Plaintiff acknowledges receipt of this letter but alleges he did not sign it because he was not in agreement with its contents.

7. On **May 15, 1990** plaintiff wrote to MR. KRAMER requesting to be reinstated to his Manager position since he was no longer disabled. The letter reads, in pertinent part:

> As you recall, in the latter part of 1988 you told me to retire or I would have to be terminated as Agency manager. I requested a retirement quotation and was contemplating retirement, until my cervical column problems forced me to make a disability claim and postpone my decision in regard to your petition to retire or be terminated.

(Exh. XI, docket No. 14)

8. MR. KRAMER responded on **May 17, 1990** advising that, since plaintiff "had agreed to take early retirement prior to [his] disability", MONY would be processing his retirement papers. (Exh. XII, docket No. 14)

In his May 15, 1990 letter seeking reinstatement after his disability has ceased, plaintiff admitted having been given an ultimatum at the end of 1988 of either retiring or being forced to leave. Even assuming that the **December 28, 1988** correspondence with the retirement quotation and projected date for retirement was not sufficient notice, defendant's subsequent **February 9, 1989** letter clearly advised plaintiff that his retirement papers would be processed once he recovered from his disability. Thus, only the effective date of the retirement was held in abeyance pending the conclusion of plaintiff's disability status.

> The rule in an employment discrimination case is that the limitations period begins to run when the claimant receives unambiguous and authoritative notice of the discriminatory act (which is another way of saying that the period begins to run when the employee learns of the adverse employment action).

. . . .

> After all, the point in time at which the consequences of the act become hardest to bear - which may or may not coincide with the occurrence of the act itself - has no relevance for purposes of framing the limitation period.

Morris v. Gov't Dev. Bank of P.R., 27 F.3d 746, 749 (1st Cir. 1994).

As previously indicated upon dismissal of the discrimination claims as time barred, defendant's allegedly discriminatory acts were explicitly made known to plaintiff prior to and at the outset of his disability status. Only the effective date of such discrimination was postponed.

> Plaintiff rests his entire argument regarding accrual on the fact that he allegedly never made a final decision to retire and therefore, there is and issue of fact regarding defendant's contention that he choose to leave. At the September 1988 meeting plaintiff was advised of MONY's unequivocal determination to dismiss him. The only contingency was his choice of method of departure. The fact that plaintiff was given the option to retire "voluntarily" does not make the underlying determination, i.e., his exit, less final for limitation purposes nor does the fact that the effective date may have been subsequently deferred until cessation of his disability status. It is also important to note that the alleged underlying discriminatory motives behind plaintiff's constructive dismissal, brought about as a consequence of the policy regarding disability insurance, were already known to him when confronted with defendant's decision in September of 1988.

Order in the Matter of Report and Recommendation at 11.

CERTIFICATION

In the alternative, plaintiff requests that we certify as final the Partial Judgment issued on July 1, 1994 (docket No. 87) under the provisions of Rule 54 (b) Fed. R. Civ. P. And 28 U.S.C. § 1292(b).

Generally, only final judgments disposing of all parties and all claims will be entertained on appeal since piecemeal review is discouraged. Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d 576, 580 (1st Cir. 1994); Darr v. Muratore, 8 F.3d 854, 862 (1st Cir. 1993). Further, "courts should go very slowly in employing Rule 54(b) when ... the factual underpinnings of the adjudicated and unadjudicated claims intertwined." Maldonado-Denis, 23 F.3d at 580. See also Kersey v. Dennison Mfg. Co., 3 F.3d at 486 ("interrelationship or overlap between the legal and factual issues raised by the dismissed and pending claims" militate against certification). For example, the issues of accrual and the jurisdictional amount which in turn implicate the unresolved breach of contract issue as discussed in this Order.

In this case, all claims in the complaint arise essentially from a common origin. Additionally, we find no justifiable grounds for departing from the finality rule requirement. Accordingly, plaintiff's request for certification for immediate appeal is **DENIED**.

JURISDICTIONAL AMOUNT

Defendant has challenged our jurisdiction to entertain plaintiff's claim for dismissal without just cause brought under the provisions of Law No. 80 of May 30, 1976 P.R. Laws Ann. tit. 29, §§ 185a et seq. (Supp. 1991) alleging that the computation of damages due under this statute does not meet the minimum jurisdictional amount.

Pursuant to § 185a, employee discharged from employment without good cause are entitled to severance pay or "mesada" computed as follows:

(a) the salary corresponding to one month as indemnity;
(b) an additional progressive indemnity equivalent to one week for each year of service.

This "compensation ... shall be paid on the basis of the highest rate of salary earned by the employee during the three (3) years immediately preceding his discharge. § 185d (emphasis ours).

The parties disagree on two different matters bearing on the application of this formula. First, they have different opinions as to which is the highest salary for computation purposes. Additionally, they also differ on the number of years of employment.

Date of Dismissal

It is uncontested that plaintiff commenced working for MONY in 1976. According to plaintiff, he was employed a total of 14 years, that is, up to and including 1990 the period during which he was receiving disability benefits.

Defendant, on the other hand, argues that the effective dismissal date was **February 1, 1989** and thus, his employment lasted 13 years in total. Because we find that the monies due plaintiff under either of these two terms of employment does not reach $50,000, the utilization of 13 or 14 years is immaterial.

Wages

Plaintiff argues that the disability benefits received during **1989** should be computed as wages for purposes of Law 80 since these amounts are considered as taxable income.

Wages for purposes of Law 80 includes all kinds of compensation including commissions. However, it is limited to payment for services rendered. Beauchamp v. Holsum Bakers, 116 D.P.R. 522, 526 (1985). Even though certain disability benefits may substitute income and are subject to tax, payment thereof cannot be considered as compensation for services within the meaning of the statute since the employee is not rendering any services to his employee during this time. As a matter of fact, implicit in the award of these benefits is the fact that the employee is unable to work. Therefore, we disagree with plaintiff's argument that the $12,205.60 monthly disability benefits paid in 1989 should be treated as wages for purposes of the computation of the "mesada" under § 185d.

According to defendant, plaintiff's earnings from 1986 through 1988[3] were as follows:

YEAR	TOTAL
1986	$101,353.15
1987	$106,610.29
1988	$139,341.14

These amounts have not been contested by plaintiff. Rather, plaintiff argues that the disability benefits received during 1989, which represent a higher amount, should be utilized instead for determining his weekly wages.

Inasmuch as we find that the disability benefits may not be utilized for computation of the "mesada", we shall utilize instead the wages for 1988, i.e., $139,341.14 which represents a weekly income of $2,679.64 and a monthly income of $11,611.76. As noted below, utilizing the computation

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[3]See Attachment to the Motion for Summary Judgment for Lack of Subject Matter Jurisdiction, filed by defendant on October 6, 1994 (docket No. **90**).

for either 13 or 14 years we do not reach the jurisdictional minimum amount for the Law 80 claim.

$ 2,679.64 (1 week)	$ 2,679.64 (1 week)
x 13 years	x 14 years
$34,835.32	$39,433.52
+11,611.76 (1 month)	+11,611.76 (1 month)
MESADA $46,447.08	MESADA $49,126.72

The minimum amount set forth in 28 U.S.C. §1332(a) is an essential jurisdictional requirement and failure to meet this threshold demands dismissal. Coventry Sewage Associates v. Dworkin Realty Co., 71 F.3d 1 (1st Cir. 1995). Further, once challenged, it is plaintiff's burden to set forth sufficient underlying information to establish, to a legal certainty, that the claim(s) meet this condition. Department of Recreation v. World Boxing Ass'n., 942 F.2d 84, 88 (1st Cir. 1991). Accordingly, we find that the Law 80 claims, by themselves, fail to meet the jurisdictional amount.

However, damages resulting from the only other remaining claim asserted under his various causes of action. See David H. Elliot Co., Inc. v. Caribbean Utilities, Co., Ltd., 513 F.2d 1176 (Th Cir. 1975).

BREACH OF CONTRACT CLAIM

Apart from the alleged Law 80 violation, the only other cause of action currently pending in this case is the breach of contract claim under the Puerto Rico Civil Code set forth in the fourth cause of action in the Amended Complaint. Paragraph 47 merely states that "[d]efendant's denial of non-cancelable disability insurance product for sale by plaintiff constitutes a breach of contract. The contracts alluded to are listed in paragraphs 36-40 of the amended complaint which authorize him to "solicit applications for insurance in MONY of the types of insurance which

MONY is issuing."[4] All contracts were limited to "such kinds of insurance [plaintiff was] licensed to solicit and service under applicable law." Therefore, plaintiff's authority as underwriter for MONY was limited to the products issued by defendant and as otherwise restricted by plaintiff's license.

Even though we had previously denied defendant's request for dismissal of this claim we find that given the discrete issues that remain outstanding and defendant's recent arguments, it merits our consideration to focus on the narrow contractual interpretation of this controversy. Accordingly, our ruling on defendant's Motion for Summary Judgment for Lack of Subject Matter Jurisdiction, filed on October 6, 1994 (docket No. **90**)[5] is hereby held in abeyance pending further arguments on the contract claim.

CONCLUSION

Plaintiff's Motion and Memorandum of Law for Relief from Judgment pursuant to F. R. Civ. P. 60(b) and/or for Certification to the Court of

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[4]The 1976 was the only one with different wording which stated:

5. GENERAL PROVISIONS

(a) This contract pertains only to business done in the territory of the Agency indicated in the caption of this contract . . . .

[5]See also Motion Supplementing Motion for Summary Judgment ... filed on December 8, 1994 (docket No. 8); Motion in Opposition ... filed on December 27, 1994 (docket No. 96) and Reply ... filed on April 12, 1995 (docket No. **105**).

Appeals, filed on June 27, 1995 (docket No. **107**) is **DENIED**.[6]

It is further ORDERED that plaintiff shall file a motion addressing defendant's arguments challenging the absence of a contractual obligation[7] no later than **March 8, 1996**.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 7th day of February, 1996

RAYMOND L. ACOSTA
United States District Judge

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[6]See Opposition ... filed on August 29, 1995 (docket No. 112).

[7]See Reply ... filed on April 12, 1995 (docket No. 105).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

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PARTIAL JUDGMENT DISMISSING DISCRIMINATION CLAIMS

The court having dismissed plaintiff's discrimination claims as untimely, it is hereby

ORDERED AND ADJUDGED that the claims asserted pursuant to P.R. Laws Ann. tit. 29, § 146 (1985), Law 100 of June 30, 1959; 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 1981 and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (ADEA) be and the same are hereby DISMISSED.

IT IS SO ORDERED.
San Juan, Puerto Rico, this 1st day of July, 1994.

RAYMOND L. ACOSTA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

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ORDER IN THE MATTER OF REPORT AND RECOMMENDATION

The parties have submitted their respective exceptions to the Magistrate's Report and Recommendation which we will examine in this Order.

PROCEDURAL BACKGROUND

Upon referral form the court, the Magistrate Judge ruled on the various motions filed by defendant requesting dismissal of the complaint as time barred as well as contesting the adequacy of plaintiff's discrimination claims. The Magistrate Judge concluded that issued of fact precluded dismissal of the discrimination causes of action as untimely but determined, however, that plaintiff had failed to meet his burden of proof on those actions and recommended that the complaint be dismissed.

Present before the court for disposition are the parties objections to the Magistrate Judge's conclusions. Plaintiff argues that the evidence in the

record is sufficient to meet the necessary requirements for the various discrimination claims asserted in the amended complaint. Additionally, he argues that dismissal of the entire pleading is improper since non-discrimination claims remain outstanding. Defendant, on the other hand, renewed the tardiness arguments.

We decline to follow the Magistrate's recommendations and find instead that the cause of action based on discrimination are untimely and their dismissal is warranted. Further, we find that the claims asserted pursuant to Law 80 and the contract violations under the Puerto Rico Civil Code provisions must be reinstated.[1]

THE CLAIMS

Plaintiff's claims arise from defendant's decision to discontinue marketing a certain disability insurance in Puerto Rico which he contends was based on non-permissive discriminatory reasons. This policy presumably affected plaintiff's conditions of employment, reduced his earnings and led to his forced retirement in violation of P.R. Law Ann. tit. 29, § 146 (1985), Law 100 of June 30, 1959 and 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964. Further, he contends that this practice interfered with his contract rights pursuant to 42 U.S.C. § 1981 and under Puerto Rico contract law. Additionally, plaintiff attacks the legality of his "early retirement" as violative of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (ADEA), and as tantamount to a dismissal without just cause contrary to P.R. Laws Ann. tit. 29, §§ 185a et seq.

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[1]Since our decision to dismiss the discrimination claims is based exclusively on the statute of limitations defense, there is no need to examine defendant's arguments regarding the sufficiency of these cause of action.

(1985), Law 80 of May 30, 1976.[2]

THE ISSUES

We shall first address the timeliness arguments since they are dispositive of all discrimination claims, i.e., Law 100, Title VII, § 1981 and ADEA. Thereafter, we shall examine the two remaining causes of action.

SUMMARY JUDGMENT STANDARD

In responding to a summary judgment petition, plaintiff cannot rest on the allegations contained in the pleadings but must advance evidence probative of each of the required elements of the claims asserted in the complaint. Lewis v. Gillette, Co., No. 93-1934, slip op. (1st Cir. April 26, 1994). Pursuant to Rule 56© Fed. R. Civ. P., the moving party carries the burden of establishing the lack of any issue of material fact and the court will view the record in the light most advantageous to the opponent conceding all possible inferences in its favor. Mendes v. Medtronic, Inc., 18 F.3d 13 (1st Cir. 1994). A timeliness defense may be ruled upon by way

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[2]The amended complaint included the following claims:

FIRST CAUSE OF ACTION: race and national origin discrimination (Law 100);

SECOND CAUSE OF ACTION: race, color and/or national origin discrimination (42 U.S.C. § 2000e);

THIRD CAUSE OF ACTION: infringement of right to make and enforce contracts free of racial bias (42 U.S.C. § 1981);

FOURTH CAUSE OF ACTION: breach of contract under local law;

FIFTH CAUSE OF ACTION: discharge based on age discrimination (29 U.S.C. §§ 621 et seq.);

SIXTH CAUSE OF ACTION: dismissal without just cause (Law 80).

of summary judgment provided that the relevant facts are not in controversy. Jensen v. Frank, 912 F.2d 517, 520 (1st Cir. 1990); see also Sabree v. United Broth. Of Carpenters and Joiners, 921 F.2d 396 (1st Cir. 1990).

UNCONTESTED FACTS

The following crucial facts pertaining to the controversy regarding the statute of limitations in these proceedings do not seem to be at issue. Rather, it is the implications of those facts that the parties are in disagreement with.

1. Plaintiff, MANUEL A. IGLESIAS, started working with MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (MONY) in 1976 as a Sales Manager.

2. Plaintiff was promoted to Agency Manager for the San Juan Office effective January 1, 1981. (Exh. E, docket No. 47)

3. By 1982 at the latest,[3] plaintiff was advised of MONY's decision not to sell its individual non-cancelable disability insurance product in Puerto Rico.

4. On several occasions, the last one by way of a letter addressed to Mr. Charles E. Lvezzoli dated February 9, 1988, plaintiff unsuccessfully attempted to persuade MONY to reverse its decision not to sell the non-cancelable disability insurance in Puerto Rico. (Exh. G-5, docket No. 47)

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[3]Defendant contends that the decision to discontinue this policy has been in effect since 1976 whereas plaintiff argues that the product was available in Puerto Rico until 1982. For purposes of this Order, however, this particular issue of fact is immaterial.

5. At a meeting held in October 1988, MR. ROBERT H. KRAMER advised plaintiff that he had the option of voluntarily retiring from MONY or otherwise he would be retired. (Plaintiff's depo. Tr. 61-71, Exh I, docket No. 47)

6. Plaintiff requested disability benefits due to his back condition in December 1988. (Plaintiff's depo. Tr. 61, 67-68, Exh. I, docket No. 22)

7. In a letter dated December 28, 1988, MR. ROBERT H. KRAMER advised plaintiff of the details concerning his "early retirement" with the particular payment terms. Additionally, the letter made reference to the specific date when his employment with MONY would cease. In pertinent part it read: "[y]our last day at work will be February 1, 1989".[4] (Exh. VII, docket No. 14)

8. Plaintiff's claim for temporary disability benefits was approved on January 25, 1989. (Plaintiff's depo. Tr. 67-68, Exh. I, docket No. 22)

9. In a letter addressed to plaintiff dated February 9, 1989 MR. KRAMER stated "you should file your early retirement papers so that as soon as you come off disability you will go straight into early retirement." Plaintiff was further admonished that he would "no longer be authorized to sing-off or act as Manager." (Exh. IX, docket No. 14)

10. In a letter dated May 8, 1990 plaintiff was advised that his disability income benefits had ceased due to the improvement in his back condition. (Exh. X, docket No. 14)

11. On May 15, 1990 plaintiff wrote to MR. KRAMER requesting to be reinstated to his Manager position since he was no longer disabled.

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[4]Plaintiff acknowledges receipt of this letter but alleges he did not sing it because he was not in agreement with its contents.

The letter reads, in pertinent part:

> As you recall, in the latter part of 1988 you told me to retire or I would have to be terminated as Agency manager. I requested a retirement, until my cervical column problems forced me to make a disability claim and postpone my decision in regard to your petition to retire or be terminated.

(Exh. XI, docket No. 14)

12. MR. KRAMER responded on May 17, 1990 advising that, since plaintiff "had agreed to take early retirement prior to [his] disability", MONY would be processing his retirement papers. (Exh. XII, docket No. 14)

13. Plaintiff filed administrative charges with the Anti-Discrimination Division of the Puerto Rico Department of Labor on August 28, 1990. (Docket No. 22, ¶ 8)

14. The initial complaint in this case was filed on April 17, 1991.

APPLICABLE STATUTE OF LIMITATIONS

The applicable statute of limitations for instituting judicial proceedings under Law 100 is one year. Olmo v. Young & Rubicam, 110 D.P.R. 740 (1981); see also Secretario del Trabajo v. E. H. Co., Inc., 116 D.P.R. 823 (1986). Both Title VII and ADEA require that charges be filed within 300 days "after the alleged unlawful employment practice occurred." See 42 U.S.C. § 2000e-5(e) and 29 U.S.C. § 626(d)(2). Since the local limitations period governing personal injury actions will be utilized in suits filed pursuant to 42 U.S.C. §1981, Goodman v. Lukens Steel Co., 482 U.S. 656, 107 S. Ct. 2617 (1987), the one-year provision for tort actions appearing in P.R. Law Ann. tit. 31 §5298 (1990) will be applied in § 1981

suits.

The controversy surrounding the timeliness of the actions alleging discrimination asserted in these proceedings[5] is centered in the more subtle issue of the accrual of the claims. In order to properly address this matter, it is important on the conduct at issue and determine when the pertinent terms started to run for purposes of the various statutes of limitations.

CONTINUING VIOLATIONS

Defendant contends that the diverse claims based on its denial to sell a particular type of disability insurance in Puerto Rico are stale inasmuch as this determination was made by MONY in 1976, arguably 1982. Plaintiff, on the other hand, claims the complaint is timely in that this policy falls withing the "continuing violation" exception to the statute of limitations.

Two types of continuing violations have been acknowledged, i.e., "serial" or "systemic". The serial kind is composed of acts which, although separate, are logically connected and prompted by discriminatory animus. Further, in serial violations, as long as at least some act falls within the limitations period, all the conduct will be actionable even if it falls outside the limitations period. Kassaye v. Bryant College, 999 F.2d 603 (1st Cir. 1993); Jensen v. Frank, 912 F.2d 517, 522 (1st Cir. 1990); Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 183 (1st Cir. 1989).

Systemic violations are ongoing discriminatory policies or practices such as discriminatory promotional systems. Actions instituted as a result

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[5]The other two claims were timely filed. Law 80 actions for dismissal without "just cause" must be filed within three (3) years from the effective date of the discharge." P.R. Laws Ann. tit. 29, § 1851 (1985). The term for instituting actions for breach of contract in Puerto Rico is 15 years. P.R. Laws Ann. tit. 31, § 5294 (1990).

thereof will be timely filed as long as the policy is in effect during the limitations period. Jensen v. Frank, 912 F.2d at 523, Mack 871 F.2d at 183 ("if both discrimination and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends.")

The only continuing violation alleged in these proceedings is MONY's suspension of certain disability insurance in Puerto Rico. According to the amended complaint, the actions, omissions, practices and policies arising from the unavailability of the disability insurance in this jurisdiction constituted a continuing pattern of discrimination based on race and national origin which culminated in plaintiff's forced retirement. Given the arguments presented by plaintiff, it would seem that the discriminatory conduct at issue is more akin to a systemic violation in that it is based on an allegedly discriminatory business directive rather than on separate/individual discriminatory acts.

Assuming that defendant's policy regarding the sale of insurance qualifies as a continuing systemic violation, we find that plaintiff's claims arising thereunder are time bared.

A. Termination of Employment

Both parties agree that a claim for dismissal from employment accrues when the adverse personnel decision is made known to plaintiff; not when it becomes effective or its consequences are felt. Chardon v. Fernández, 454 U.S. 6, 102 S.Ct. 28 (1981); United Air Lines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. 1885 (1977); Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179, 182 (1st Cir. 1989).

> In the cases at bar, respondents were notified, when they received their letters, that a final decision had been made to terminate their appointments. The fact that they were afforded reasonable notice cannot extend the period within which suite must be filed.

Chardon, 454 U.S. at 8.

For purposes of the limitations period, the relevant date is when plaintiff is effectively notified that he has lost his job. There are no formal notice requirements; only that claimant be apprised of the cessation of employment.

> In employment discrimination cases involving wrongful discharges, the statute of limitations begins to terminate his employment (even if the notice he receives is informal).
>
> It is the clarity of the notice received, not whether it is memorialized on official stationery or reduced to writing, that determines the accrual of causes of action premised upon wrongful deprivation of employment . . . .

Rivera-Muriente v. Agosto-Alicea, 959 F.2d 349, 353 (1st Cir. 1992) (citations and footnote omitted).

We find that the accrual for dismissals in situations involving continuing violations is also the time when the plaintiff is clearly put on notice of the termination. This is so inasmuch as discharge from employment is a definite act, not susceptible to repetition regardless of the presence of discriminatory policy. Further, once claimant has been given notice of dismissal, "the existence of the discriminatory 'system' can no longer deter the complainant from seeking his full employment rights." Jensen v. Frank, 912 F.2d at 523 n.4.

Plaintiff alleges that the limitations period for the alleged constructive dismissal began to run on May 17, 1990 when MONY rejected his petition for reinstatement. We disagree.

Plaintiff concedes that he was explicitly advised in September 1988 that either he voluntarily left his position or defendant would force him to leave. Assuming *arguendo* that the notice given at the meeting was not sufficiently clear, the successive letters from MR. KRAMER, which plaintiff does not dispute having received, explicitly informed him that his employment with MONY would cease as well as the effective date of retirement".[6]

Plaintiff rests his entire argument regarding accrual on the fact that he allegedly never made a final decision to retire and therefore, there is an issue of fact regarding defendant's contention that he chose to leave. At the September 1988 meeting plaintiff was advised of MONY's unequivocal determination to dismiss him. The only contingency was his choice of method of departure. The fact that plaintiff was given the option to retire "voluntarily" does not make the underlying determination, i.e., his exit, less final for limitation purposes nor does the fact that the effective date may have been subsequently deferred until cessation of his disability status. It is also important to note that the alleged underlying discriminatory motives behind plaintiff's constructive dismissal, brought about as a consequence of the policy regarding disability insurance, were already known to him when confronted with defendant's decision in September of 1988.

Accordingly, we find that the notice of adverse personnel action for purposes of the statute of limitations took place in September 1988 and that plaintiff's claims of his forced "early retirement" based on allegedly discriminatory reasons accrued on that date.[7] Therefore, his administrative

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[6]See December 28, 1988 letter confirming plaintiff's retirement to become effective February 1, 1989 and February 9, 1989 letter advising that, upon conclusion of his disability benefits, he would "go straight into early retirement".

[7]In any event, no later than February 9, 1989, when he was put on

claim filed on August 28, 1990 and the complaint filed on April 17, 1990, are untimely inasmuch as they were instituted well beyond the pertinent time requirements of the Title VII, ADEA, Law 100 and § 1981 actions.

B. Discriminatory Practices/Policies

In addition to challenging his removal, plaintiff claims that he was subject to unlawful employment practices resulting from MONY's decision regarding the disability insurance. Plaintiff contends that this policy adversely affected his conditions of employment by reducing his income and hindering his ability to retain qualified personnel. Assuming again that the aforementioned injuries were caused by a continuing violation, once plaintiff commenced receiving disability benefits, he was no longer subject to any of these allegedly discriminatory practices. As far a s MR. IGLESIAS is concerned, the effects of the policy under attack ended on or about January 25, 1989 when his request for temporary disability benefits was approved. Under these circumstances, we see no legal impediment for requiring that plaintiff institute proceedings to challenge a discriminatory policy in effect since at least 1982[8] within 300[9] or 365[10] days from his disability. While conscious of the need to allow an injured claimant sufficient time to demand protection from discriminatory conduct, the purpose behind the limitations doctrine is precisely to avoid stale claims. Sabree v. United Broth. Of Carpenters and Joiners, 921 F.2d 396, 401 (1st

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notice that retirement would occur upon conclusion of the disability benefits.

[8]There is abundant evidence in the record to indicate that MR. IGLESIAS was aware of the purported discriminatory animus behind MONY's decision early on.

[9]Applicable to Title VII and A.D.E.A. causes of action.

[10]Applicable to Law 100 and § 1981 claims.

Cir. 1990).

Thus, we find that any claims based on the adverse consequences of defendant's policy not to sell disability insurance based on Title VII, ADEA, Law 100 and § 1981[11] accrued on or about January 25, 1989 at the latest and are also time barred due to the belated August 1990 and April 1991 filings.

LAW 80

In response to the claims for dismissal without just cause pursuant to Law 80, defendant contends that plaintiff was not discharged but chose instead to retire. In the alternative, defendant argues valid grounds existed which would justify plaintiff's dismissal from employment, i.e., low sales volume and allegedly questionable business practices.

We find that whether plaintiff opted for voluntarily retirement or if he was instead terminated without just cause within the meaning of Law 80 is a question of fact to be determined at trial. Accordingly, we decline to dismiss this claim.

VIOLATION OF CONTRACT - P.R. LAW

We also find that whether or not plaintiff indeed has a valid claim under the local contract provisions and it so, whether or not defendant breached such an agreement presents an issue of material fact which may not be disposed of summarily. Therefore, plaintiff's breach of contract claim asserted under the Puerto Rico Civil Code remains pending.

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[11]Apart from the termination claim.

CONCLUSION

Based on the foregoing, the Magistrate's Report and Recommendation filed on March 22, 1993 (docket No. **60**) is **NOT ADOPTED**.

It is further ORDERED that Defendant's Objections to Magistrate's Report and Recommendations ... filed on April 2, 1994 (docket No. **62**) are hereby **GRANTED** but only insofar as reinstating the Law 80 and the local contract claims.[12]

IT IS SO ORDERED.

San Juan, Puerto Rico, this 1st day of July, 1994.

RAYMOND L. ACOSTA
United States District Judge

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[12]This Order also disposes of the following filings: dockets No. 14, 15, 21, 22, 27, 36, 47, 65 and 66.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
	*	
Defendant.	*	

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MAGISTRATE'S REPORT AND RECOMMENDATION

Defendant Mutual Life Insurance Company of New York sells insurance products in Puerto Rico. In 1976, defendant decided not to sell disability insurance in Puerto Rico anymore. Later in that same year plaintiff began working as Sales Manager for defendant in Puerto Rico. In 1981 he was promoted to the position of Agency Manager. In 1990, he retired from his employment with defendant.

Plaintiff alleges that he has been a victim of discrimination based on race and national origin (because he is a Puerto Rican), of unlawful employment practices and of an unlawful dismissal while being employed by defendant. In the amended complaint, plaintiff pleads six counts:

Count I-race and national origin discrimination in violation of Puerto Rico's Act 100 of June 30, 1959, P.R. Law Ann. tit. 29 § 146 (1959) and the Constitution of the Commonwealth of Puerto Rico;

Count II-employment discrimination and discharge in violation of 42 U.S.C. § 2000e et seq.;

Count III-violation of federal right to enter into a contract under 42 U.S.C. § 1981;

Count IV-breach of employment contract in violation of the Civil Code of Puerto Rico;

Count V-age discrimination in violation of 29 U.S.C. § 621 et seq.; and

Count VI-unfair dismissal from employment in violation of Law 80 of May 30, 1976, P.R Laws Ann. tit. 29, § 185a (1976).

Defendant filed a motion to dismiss and/or for partial summary judgment alleging that counts I to II of the amended complaint should be dismissed since they are time barred. Plaintiff filed and opposition alleging that they are not time barred since defendant's clear and unequivocal notice of termination occurred in May, 1990. Defendant filed a reply alleging that notice was given as early as October 1988, and no later than February, 1989.

Subsequently, defendant filed a motion for summary judgment alleging that it did not terminate plaintiff's employment since upon giving plaintiff the option of taking advantage of defendant's early retirement program, plaintiff voluntarily retired, and even if he had chosen not to retire nor to be placed on probation, his termination would have been warranted in light of his poor termination. Plaintiff filed an opposition alleging that there are genuine issues of material facts. Defendant was granted until February 5, 1993 to file its reply but failed to do so.

STATUTE OF LIMITATIONS

Defendant alleges that counts I to III should be dismissed since they are time barred.

As both parties agree, the time period for all counts begins to run when the employee is terminated or receives notification of the termination of his employment.

Count I alleges damages suffered as a consequence of a violation of Act 100 and the Constitution of the Commonwealth of Puerto Rico. The statute of limitations in Puerto Rico for claims under Act 100 is one year. Olmo v. Young & Rubicam, 10 Official Translations of the Opinions of the Supreme Court of Puerto Rico 965, 972 (1981). The period starts to run form the moment in which the employee has knowledge of the damage or of the decision to terminate him. See id. at 972-74; P.R. Laws Ann. tit. 31 § 5298 (1930).

Count II alleges a violation of Title VII. Pursuant to Title VII, the plaintiff must exhaust the administrative remedy within 300 days. See Chardonv. Fernández, 454 U.S. 6, 29 (1981); Farrell v. Bank of New Hampshire-Portsmouth, 929 F.2d 871, 873 (1st Cir. 1991).

Count III alleges a violation of 42 U.S.C. § 1981. The statute of limitations applicable to civil rights claims in Puerto Rico is the same for tort damage occurs or the aggrieved party has knowledge of the damage. See Chardon v. Fernández, 454 U.S. at 29; Farrell v. Bank of New Hampshire-Portsmouth, 929 F.2d at 873.

The complaint was filed on April 17, 1991. Nowhere in the amended complaint does plaintiff allege that he was terminated or notified about the termination of his employment before April 17, 1990. Therefore, considering this motion as a motion for summary judgment, it should also

be denied.

Federal Rule of Civil Procedure 56© mandates the entry of summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986); Finnern v. Sunday River Skiway Corp., No. 92-1625, slip op. At 2 (1st cir. Jan. 29, 1993). Summary judgment shall be entered against a party who, after adequate time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. at 322.

On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law, and a dispute is genuine if a reasonable jury could resolve it in favor of the nonmoving party. Serrano-Pérez v. FMC Corp., No. 92-2060, slip op. at 2 (1st Cir. Feb. 11, 1993); Massachusetts v. Secretary of Agric., No. 92-1539, slip op. at 23 (1st Cir. Jan. 22, 1993) (citations omitted).

The moving party bears the initial burden of averring and absence of evidence to support the nonmoving party's case. That burden having been met, the nonmoving party may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Lawrence v. Northrop, 980 F.2d 66, 68 (1st Cir. 1992) (citations omitted).

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Serrano-Pérez v. FMC Corp., No. 92-2060, slip op. at 2. The nonmoving party must present definite, competent evidence to rebut the motion. Pagano v. Frank, 983 F.2d 343,

347 (1st Cir. 1993); Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791, 794 (1st Cir. 1992).

Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation. Medina-Muñoz v. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990); Goldman v. National Bank of Boston, No. 92-1773, slip op. at 1 (1st Cir. Feb. 18, 1993).

There is evidence in the record tending to support that plaintiff was notified of defendant's decision to terminate him in October, 1988 and February, 1989. (Defendant's Exhibit VI-Plaintiff's Deposition at 61-62; Defendant's Exhibit IX-Letter Date February 9, 1989; Defendant's Exhibit XI-Letter Dated May 15, 1990; Plaintiff's Exhibit I-Plaintiff's Deposition at 71).

There is evidence showing that plaintiff was terminated on May 17, 1990. (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit B-1-Statement of Manuel Iglesias at 1.)

There is also evidence in the record tending to support that plaintiff was never notified of defendant's decision to terminate him, but rather, that plaintiff was granted the opportunity to choose between early retirement or probation, and that he chose early retirement. (Defendant's Motion for Summary Judgment - Exhibits: Exhibit IV-Statement by Robert H. Kramer at 1.)

There is a clear genuine controversy of material facts in this case related to the issue of the applicable statutes of limitations. Therefore, I recommend that defendant's motion to dismiss and/or summary judgment (Docket No. 15) be denied.

DISCRIMINATION

The plaintiff in an ADEA discrimination suit bears the ultimate burden of proving that his years were the determinative factor in his discharge, that is, that he would not have been fired but for his age. Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991), cert. denied, 112 S.Ct. 2965 (1992); Freeman v. Package Mach. Co., 865 F.2d 1331, 1335 (1st Cir. 1988). However, when, as here, the plaintiff produces no direct evidence of age discrimination, his case is governed in the first instance by the burden shifting of McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802-05 (1973); see Cuello-Suárez v. Puerto Rico Elec. Power Auth., No. 92-1989, slip op. at 5 (1st Cir. Mar. 10, 1993).

The plaintiff must initially make a prima facie showing of discrimination, which requires a demonstration that (1) the plaintiff was over the age of forty; (2) his work was sufficient to meet his employer's legitimate expectations, (3) his employer took adverse action against him; and (4) the employer sought a replacement with roughly equivalent job qualifications, thus revealing a continued need for the same services and skills. This showing gives rise to an inference that the employer discriminated due to the plaintiff's advanced years. See McDonnell Douglas Corp. v. Green, 411 U.S. at 802-05; Mesnick v. General Elec. Co., 950 F.2d at 823.

At this point the burden shifts to the defendant. The defendant must then articulate a legitimate, nondiscriminatory reason for the adverse employment decision. This entails only a burden of production, not a burden of persuasion since the task of proving discrimination remains the claimant's at all times. Id. at 823.

The burden shifts again to plaintiff to show, unassisted by the original inference of discrimination, that the employer's proffered reason is actually a pretext for discrimination. It is not enough for the plaintiff to merely

impugn the veracity of the employer's justification. "He must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: age discrimination." Mesnick v. General Elec. Co., 950 F.2d at 823 (citing Medina-Muñoz v. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)).

Title VII renders it unlawful for an employer to discharge any individual because of such individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a) (1). When a plaintiff does not produce direct evidence of discriminatory intent, his claim must be analyzed under the burden shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), which operates in the same way for Title VII cases as for ADEA cases. Pagano v. Frank, 983 F.2d at 347.

"It is important to remain mindful that, when the summary judgment record is complete, the jurisprudence of Rule 56" takes hold and the "McDonnell Douglas burden-shifting framework" must adapt to the rule. If the plaintiff has failed to limn a prima facie case, the inference of discrimination never arises, and the employer's motion for summary judgment will be granted. Mesnick v. General Elec. Co, 950 F.2d at 824; see Menard v. First Sec. Servs. Corp., 848 F.2d 281, 285-87 (1st Cir. 1988).

Defendant alleges that summary judgment should be granted since plaintiff was never terminated, but voluntarily chose to retire, and even if he had chosen not to retire nor to be placed on probation, his termination would have been warranted in light of his poor performance. Plaintiff, on the other hand, alleges that an analysis of the statistics reflect that his sales performance was better than that of the employee who replaced him.

If find that plaintiff has failed to make a prima facie showing of discrimination. As to the ADEA claim, plaintiff established that (1) he was over forty. He failed to establish that (2) his work was sufficient to meet his employers' legitimate expectations, (3) his employer took adverse action

against him; and (4) the employer sought a replacement with roughly equivalent job qualifications, thus revealing a continued need for the same services and skills. As to the Title VII claim he failed to establish any of the applicable requirements (2 to 4).

Moreover, the defendant has met its "burden of production" by articulating a legitimate, nondiscriminatory reason for the adverse employment decision. It filed exhibits which show that plaintiff's sales performance during the last years was poor (Defendant's Exhibit VII-Letter dated April 5, 1984; Defendant's Exhibit XXIII-Manuel Iglesias' Sales production), that he padded expenses (Defendant's Exhibit XXVI-Travel Expense Vouchers; Defendant's Exhibit XX-Plaintiff's Deposition at 167-168), and that he showed poor judgment (Defendant's Exhibit XXIII-Plaintiff's Deposition at 215).

Therefore, I find that plaintiff's federal discrimination claims (Counts II and V) should be dismissed.

OTHER COUNTS

The defendant also requests dismissal of the remaining counts of the amended complaint. The remaining counts are: Count I (discrimination claim under Puerto Rico's Act 100), Count VI (unfair discharge from employment under Puerto Rico's Act 80), Count III (violation of federal right to enter into contracts), and Count IV (breach of employment contract under Puerto Rico Law).

In the motion for summary judgment, the defendant alleged (and included exhibits) that it did not discriminate against or unlawfully discharge plaintiff. It also alleged(and presented exhibits in support) that when plaintiff was hired, it had already made the decision not to sell disability insurance products in Puerto Rico, and that the sale of that product was not part of its contract with plaintiff.

BEST AVAILABLE COPY

As stated above, plaintiff had the burden of rebutting defendant's motion with competent evidence. However, in its opposition, plaintiff failed to present any competent evidence to establish his claims. Plaintiff did not present any affidavits or any other kind of documents which support his allegations of discrimination. The record reflects only that plaintiff is a Puerto Rican, his replacement was not, and that prior to his position as Sales Manager the company decided not to sell disability insurance in Puerto Rico. This is not sufficient to support an allegation of discrimination and to rebut defendant's motion for summary judgment.

"Because courts should not encourage long, expensive trials merely to discover whether any evidence exists to support a claims," summary judgment should be granted in this case. See Medina-Muñoz v. Reynolds Tobacco Co., 896 F.2d at 10.

Therefore, I recommend that defendant's motion for summary judgment (docket No. 27) be granted.

Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140 (1985); Borden v. Secretary of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

At San Juan, Puerto Rico, this 22d day of March, 1993.

JUSTO ARENAS
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
	*	
Defendant.	*	

****

AMENDED COMPLAINT

TO THE HONORABLE COURT:

COMES NOW THE PLAINTIFF, and through his undersigned legal counsel respectfully states, alleges and requests as follows:

INTRODUCTION

This is a civil action for declaratory relief, equitable relief and monetary damages by a former employee and field underwriter of defendant Mutual Life Insurance Company of New York ("MONY"). Plaintiff brings this action to remedy the deprivation of rights secured to him under the laws of Puerto Rico. Plaintiff alleges that he has been the victim of discrimination based on race and national origin because he is Puerto Rican, of unlawful employment practices and of an unlawful dismissal while employed by MONY, practices prohibited under the laws and Constitution

of the Commonwealth of Puerto Rico. Defendant MONY's unlawful and illegal employment practices culminated in the constructive dismissal of the Plaintiff on May 17, 1990. Plaintiff requests of this Honorable Court compensation for his sufferings and or lost income, as well as for a preliminary and permanent injunction against the practices complained of herein, and for declaratory relief.

Plaintiff invokes the protection of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et. seq., for the employment discrimination and discharge to which he was subjected by the defendant because of his race, color and/or national origin (Puerto Rican).

Plaintiff further alleges that his federal constitutional rights to make and enter into contracts, guaranteed by the Civil Rights Act, 42 U.S.C. § 1981 has been unlawfully violated by defendant MONY, and that his contract as a filed underwriter was breached by the defendant, for which MONY is liable to him under the Civil Code of Puerto Rico. He requests other and further relief for these claims and the resulting damages he has suffered.

Plaintiff also alleges that he was unlawfully and illegally discriminated against by MONY on account of his age - 57 years old - when he was terminated and replaced with another person approximately 15 years younger, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et. seq.

Finally, Plaintiff contends that he was unjustly dismissed from his employment with MONY, in violation of Law 80 of May 30, 1976, of the Commonwealth of Puerto Rico, for which he requests the severance pay ("mesada") due him under said law.

JURISDICTION

1. The jurisdiction of this Court, based on diversity of citizenship and arising under the laws of the United States, is invoke pursuant to 28 U.S.C. § 1332, 2201, 2202 and 1331.

2. Plaintiff MANUEL A. IGLESIAS is, and was at all times relevant to this action, domiciled in and a citizen of the Commonwealth of Puerto Rico.

3. Defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (hereinafter "MONY") is, and was at all times relevant to this action, a corporation duly organized and existing under the laws of the State of New York or another state outside the Commonwealth of Puerto Rico, with its principal place of business in New York, New York.

4. This action involves a sum in excess of fifty thousand dollars ($50,000.00), exclusive of interests and costs. Every issue of law and fact herein is wholly between citizens of different states.

5. This is the proper venue to bring this action because the facts relating to this cause of action arose in this District.

PARTIES

6. Plaintiff MANUEL A. IGLESIAS is an adult resident of Carolina, Puerto Rico. He is a United States citizen born and raised in Puerto Rico of Puerto Rican parents. He was employed by MONY in Puerto Rico from 1976 until 1990.

7. Defendant MONY is a corporation with its headquarters and principal place of business in the State of New York. It is incorporated under the laws of that state or another state outside of the Commonwealth

of Puerto Rico. It is an industry affecting interstate commerce and employing more than fifteen persona. It operates a division of its business - the San Juan Agency - in the Commonwealth of Puerto Rico. MONY is dedicated to the sale of life, health and disability insurance, pension plans, financial services as a brokered dealer in the New York Stock Exchange, real estate investments, and to providing other types of financial services. (It may be referred to herein as "the Company".)

FIRST CAUSE OF ACTION

8. In 1976, and after being recruited by representatives of defendant MONY in Puerto Rico, Manuel A. Iglesias began to work with MONY as Sales Manager for Puerto Rico.

9. In doing so Mr. Iglesias became an employee of MONY with his salary based on a percentage of sales generated. Furthermore, he began to receive a number of fringe benefits including but not limited to, life and disability insurance, a health and hospitalization plan and a pension plan.

10. At that time Mr. Iglesias also became a MONY sales agent, by means of a contractual agreement with the Company.

11. The primary reason plaintiff joined MONY, instead of competitors which had extended him offers, was because that company offered the full range of products.

12. Among the products being sold in Puerto Rico as of June 1976 when plaintiff became Sales Manager for the San Juan Agency was MONY's non-cancellable disability insurance product.

13. Between 1976 and 1980 however, plaintiff, and the agents he recruited and supervised, sold as one of their regular products, a low-cost disability insurance product of a nonprofit association. This was a

conscious business decision taken by the plaintiff with MONY's full knowledge and approval.

14. During this period (1976 - 1980), MONY's non-cancellable disability insurance product was available for sale in Puerto Rico and a number of said policies were sold.

15. Subsequently, and after a highly successful performance as Sales Manager, Manuel Iglesias was promoted to Agency Manager for Puerto Rico (the "San Juan Agency") beginning in 1981, with a guaranteed starting annual salary of over $190,000.00 (one hundred ninety thousand dollars).

16. Mr. Iglesias thereby became the first Puerto Rican Agency Manager in the MONY San Juan Agency's history.

17. After Mr. Iglesias became agency manager, marketing, costs, and other sound business considerations lead him to return to reliance on MONY's non-cancellable disability insurance product as the primary complement to the other MONY products available, instead of the non-profit product marketed during the preceding few years.

18. This important business decision by plaintiff as head of the San Juan Agency was effectively vetoed and undermined in 1982 by MONY, through its Senior Officers, who unilaterally and inexplicable decided to discontinue sales of the MONY non-cancellable disability insurance product in Puerto Rico.

19. Upon information and belief, Puerto Rico thereby became only U.S. - flag market in which MONY has ceased selling its non-cancellable disability insurance product, including the continental U.S., the District of Columbia, the U.S. Virgin Islands, and other U.S. territories.

20. The decision taken by MONY was highly detrimental to plaintiff and his agency, as it was the direct cause of a precipitous drop in total sales, an increase in agent departures and an all-around negative effect on San Juan Agency staff morale, which severely effected plaintiff's earnings, physical and emotional health and standing among his peers in the insurance business community.

21. This decision constituted unlawful discrimination by MONY against plaintiff, his agency and his clientele based on his race, color and/or national origin as a Puerto Rican.

22. This decision had the unlawful and economically detrimental effect of eliminating an entire market and its related sales income from the plaintiff's reach, based solely and/or primarily on reasons of race, color and/or national origin (Puerto Rican).

23. The decision taken by MONY was not based on legitimate business reasons nor bona fide commercial considerations. Rather, it was motivated by unlawful, subjective considerations of a racist, bigoted and discriminatory nature against Puerto Ricans in general.

24. Specifically, MONY's refusal to make its non-cancellable disability product available to plaintiff for sale in Puerto Rico was motivated, among other reasons, by:

a. prejudice against the Puerto Rico legal system and alleged fear of unfair treatment of the company by these Courts, and by Puerto Rican judges in particular, in cases of claims because it is a United States firm;

b. discriminatory attitudes toward Puerto Rican doctors;

c. bigoted and irrational appreciation of the treatment MONY would receive from pertinent Puerto Rican government agencies;

d. irrational and grossly exaggerated fears about the alleged costs and detrimental effects of the use of the Spanish language in the issuance of policies and adjudication of claims.

25. The denial of this important product by defendant to plaintiff was a result of an unlawful, bigoted and discriminatory animus by MONY and its high-ranking decision-making senior staff toward Manuel A. Iglesias, his staff, agents, clientele and potential clientele based on their race, color or national origin as Puerto Ricans.

26. The unavailability of MONY's non-cancellable disability product at the San Juan Agency cause a sharp reduction in sales and commissions, with the resulting loss of field underwriters who left the agency in large numbers for competitor insurance companies, and causing plaintiff a server drop in earnings, loss of potential future income, embarrassment within his agency and the general insurance business community, as well as adverse health effects.

27. The denial of the product thus resulted in morale problems, internal friction between plaintiff and his field underwriters (agents), waste of resources in the training of agents who were soon lost to raid agent turnovers, increased stress for plaintiff in his dealings within his agency and with MONY's upper management, and to a substantial loss of income for plaintiff whose salary was largely dependent on the San Juan Agency's volume of sales.

28. The unlawful race and national origin-based discrimination to which plaintiff and his agency were subjected cause plaintiff profound frustration, humiliation, embarrassment, mental anguish and emotional

suffering as he repeatedly attempted, in vain over a six (6) year period, to obtain the vital product unlawfully withdrawn and denied to his agency.

29. Despite plaintiffs best efforts to prevent or otherwise minimize the noxious effects of MONY's discrimination, the San Juan Agency was crippled by this unlawful decision and suffered economically.

30. The resulting reduction in sales, turnover of agents, morale problems and other problems foisted upon the agency by MONY's discriminatory policy were eventually used by MONY as the pretext to constructively terminate plaintiff against his will in May, 1990, by means of an involuntary "early retirement".

31. Defendant MONY's actions against plaintiff in denying him the necessary products to allow the San Juan Agency to compete in the Puerto Rico market were done in bad faith, in absence of rational or justifiable business reasons and/or were motivated by false, bigoted, racially prejudiced and unlawful discrimination against Puerto Ricans.

32. The actions, omissions, practices and policies by defendant MONY against Manuel A. Iglesias constitute, from their inception, a continuing pattern of illegal race and national origin discrimination against plaintiff in violation of Law 100 of Puerto Rico and of plaintiff's right to dignity and to be free from race and national origin discrimination under the Constitution of the Commonwealth of Puerto Rico.

SECOND CAUSE OF ACTION

32. Plaintiff repeats and re-alleges all of the facts, assertions and information contained in paragraphs 1 through 32, inclusive.

33. The aforementioned policies, practices, acts and omissions of defendant MONY violated the rights of plaintiff Manuel Iglesias to be free

from discrimination based on race, color and/or national origin, as guaranteed by Title VII of the Civil Rights Acto of 1964, 42 U.S.C. § 2000e et seq.

34. The plaintiff has complied with the administrative remedies provided by Title VII, by filing charge No. 16H-90-0247 and has requested and received a "Notice of Right to Sue", a copy of which is accompanied herewith as "Attachment A".

THIRD CAUSE OF ACTION

35. The plaintiff repeats and re-alleges all of the allegations, facts and information contained in paragraphs 1 through 34, inclusive.

36. In 1979, and in addition to his status as en employee of MONY, Manuel A. Iglesias entered into a "Lifetime Plan Contract" with defendant MONY.

37. Under the terms of said contract, Mr. Iglesias was appointed a "full-time MONY field Underwriter", authorized, inter alia, to solicit applications for insurance with MONY for all the types of insurance the defendant company issues.

38. The contract remained in effect until 1987, when it was replaced and superseded by the "Career Contract" signed between plaintiff and defendant.

39. The relevant terms and conditions of the Career Contract are substantially the same as the earlier contract in terms of appointment the same as the earlier contract in terms of appointment as field underwriter and authorization to solicit application for MONY insurance policies.

40. Both contracts specifically mentioned that compensation was to be paid plaintiff for business produced by him from all the different products produced and being issued by the defendant company.

41. These contracts existed in addition to the employment contracts in effect between the plaintiff and the defendant from 1976 through 1990.

42. The Career Contract was in effect until May, 1990, when it, too, was unilaterally breached and terminated by the defendant company.

43. Between 1976 and 1990, plaintiff acted as a field underwriter for defendant MONY, directly soliciting insurance applications, collecting premiums thereon and servicing his insured clients.

44. Because of defendant's illegal, unjustified, and discriminatory policy and practice of refusing to issue non-cancellable disability insurance in Puerto Rico as described above, plaintiff's clearly secured rights "to make and enforce contracts, ... as is enjoyed by white citizens" were breached, in violation of 42 U.S.C. §1981.

45. Defendant's discriminatory actions, inaction, policies and practices against plaintiff and his clientele because of his race, and national origin has been the direct cause of plaintiff's continuing and substantial loss of income (past, actual and future), embarrassment, humiliation, mental anguish and emotional suffering.

FOURTH CAUSE OF ACTION

46. Plaintiff repeats and re-alleges the facts, assertions, information and claims contained in paragraphs 1 through 45, inclusive.

47. Defendant's denial of the non-cancellable disability insurance product for sale by plaintiff constitutes a breach of contract in violation of

the applicable laws codified in the Civil Code of Puerto Rico, and has been the direct and immediate cause of lost actual and future income, and of mental and emotional damages, since it first occurred in 1982.

FIFTH CAUSE OF ACTION

48. Plaintiff repeats and re-alleges the facts, assertions, information and claims contained in paragraphs 1 through 47, inclusive.

49. When the company forced Mr. Iglesias into an involuntary "early retirement" at age 57, he was a member of the class of persons protected by the A.D.E.A., 29 U.S.C. § 621 et seq., was constructively discharged, was replaced by a much younger person, and this was done despite the fact that plaintiff was and remains qualified to do the job he was discharged from.

50. Mr. Iglesias' age was a factor which contributed to and/or was a significant factor taken into consideration by the defendant in its decision to force him into "early retirement".

51. Defendant MONY's constructive dismissal of plaintiff Manuel Iglesias constitutes discrimination against plaintiff because of his age, in violation of the A.D.E.A.

SIXTH CAUSE OF ACTION

52. Plaintiff repeats and re-alleges each and every fact, allegation and assertion contained in paragraphs 1 through 51, inclusive.

53. Defendant's action against plaintiff, forcing him into early retirement, was wholly unjustified in fact and in law.

54. Defendant's actions constituted and unjust dismissal of plaintiff from his employment, in violation of Law 80 of May 30, 1976 of the

Commonwealth of Puerto Rico.

RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

1. Enter a Declaratory Judgment that the actions, omissions, policies and practices complained of herein are in violation of the Constitution and laws of the Commonwealth of Puerto Rico and of the United States.

2. Issue a preliminary and permanent injunction:

a. enjoining defendant and its agents, successors, employees, attorneys and representatives from engaging in the discriminatory policies and practices based on race or national origin against plaintiff complained of herein;

b. ordering the reinstatement of plaintiff as San Juan Agency manager with full back pay, including any fringe benefits, incentives or any further compensation to which plaintiff would have been entitled if he had not been constructively dismissed.

3. Award the plaintiff compensation for loss of income caused by defendant's unlawful employment actions in an amount no less than $7,000,000.00 (seven million dollars).

4. Award the plaintiff compensation for loss of income caused by defendant's unconstitutional an and illegal contractual violations in an amount no less than $250,000.00 (two hundred and fifty thousand dollars).

5. Award the plaintiff actual damages caused as a result of defendant's illegal acts in an amount of no less than $500,000.00 (five hundred thousand dollars).

6. Award the plaintiff punitive damages in an amount of no less than $500,000.00 (five hundred thousand dollars).

7. Award the plaintiff the severance pay ("mesada") due him in accordance with Law 80, in an amount no less than $51,500.00 (fifty-one thousand, five hundred dollars).

8. Retain jurisdiction over this action in order to assure full compliance with the decree in the event that the Court finds that the acts complained of herein were illegal and/or unconstitutional.

9. Award the Plaintiff the cost of this action, together with reasonable attorney's fees as provided for in the 42 U.S.C. § 1988 of the Civil Rights statutes and in the A.D.E.A.

10. Grant Plaintiff such other and further relief as the Court may deem appropriate and proper.

In San Juan, Puerto Rico, this 3rd day of September, 1991.

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TITLE VII OF CIVIL RIGHTS ACT OF 1964
(42 U.S.C. §§2000e, et seq.), as AMENDED

§2000e. **Definitions.**

For the purposes of this subchapter:

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, and Indian tribe, or any department r agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 Title 5), or (2) bonafide private membership club (other than a labor organization which is exempt from taxation under section 501© of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

© The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization

engaged in a industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engage which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organizations) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization:

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees withing the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal power of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or withing the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any

activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 and further includes any governmental industry, business, or activity.

(I) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

§2000e-1. **Foreign and religious employment.**

(a) Inapplicability of subchapter to certain aliens and employees of religious entities. This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) Compliance with statute as violative of foreign law. It shall not be unlawful under section 2000e-2 or 2000e-3 of this title for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or joint other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violated the law of the foreign country in which such workplace is located.

© Control of corporation incorporated in a foreign country.

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on:

(A) the interrelation of operations;
(B) the common management;
© the centralized control of labor relations;
(D) the common ownership or financial control, of the employer and the corporation

§2000e-2. **Unlawful employment practices.**

(a) Employer practices. It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin.

© Labor organization practices. It shall be an unlawful employment practice for a labor organization:

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Business or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion. Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) ....

(g) ....

(1) ....

(2) ....

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage

provisions. Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earning by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(I) ....

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin, employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion,

sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

(k) Disparate impact as basis of practice.

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if:

(I) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph © with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(I) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(I), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation of analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

© The demonstration referred to by subparagraph (A)(ii) shall be

in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense a claim of intentional discrimination under this subchapter .

(3) ....

(l) ....

(m) ....

(n) ....

§2000e-3. **Other unlawful employment practices.**

....

§2000e-4. **Equal Employment Opportunity Commission.**

....

§2000e-5 **Enforcement provisions.**

(a) ....

(b) ....

© ....

(d) ....

(e) Time for filing of charges; notice; time unlawful practice with respect to seniority system occurs.

(1) A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved withing three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) . . . .

(g) Relief available.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court:

(I) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue and order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) . . . .

(l) ....

(j) ....

(k) Attorney's fee; liability of Commission and United States for costs. In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fee) as parte of the costs, and the Commission and United States shall be liable for costs the same as a private person.

....

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (29 U.S.C. §§621 et seq), AS AMENDED

§621. **Statement of Findings and Purpose.**

(a) The Congress hereby finds and declares that:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their effort to retain employment, and especially ro regain employment when displaced from jobs;

(2) the setting or arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§622. **Education and Research Program.** [Omitted]

§623. **Prohibition of Age Discrimination.**

(a) Employer practices. It shall be unlawful for and employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices. It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age or to classify or refer for employment any individual on the basis of such individual's age.

© Labor organization practices. It shall be unlawful for a labor organization:

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise

adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for any employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member, or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization:

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification

reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section:

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or

. . . .

(g) . . . .

(h) . . . .

(I) . . . .

(j) . . . .

(k) . . . .

(l) Early retirement benefits; Social Security benefits; contingent event unrelated to age; severance pay; unemployment compensation benefits; retiree health benefits; calculation of premium rates; and long-term disability benefits . . . .

§624. **Study by Secretary of Labor.** [Omitted]

§625. **Administration.** [Omitted]

§626. **Record keeping, Investigation, and Enforcement.**

(a) . . . .

(b) . . . .

© Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, that the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such person under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed:

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling. Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in Section 630 against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) ....

§627. **Notice to be Posted.** [Omitted]

§628. **Rules and Regulations.** [Omitted]

§629. **Criminal Penalties.** [Omitted]

§630. **Definitions.**

For the purposes of this Act:

(a) The term "person" means one or more individual, partnerships, associations, labor organizations, corporations, business trusts, legal

representatives, or any organized groups of person.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Provide, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

© The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in a industry affecting commerce, and any agent of such an organization, and includes any organization of any kind an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purposed, in whole or in participate and which exists for the purpose, in whole or in parte, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for

employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) . . .

. . . .

(f) The term "employee" means any individual employed by an employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States, or between a State and any place outside thereof; or withing the District of Columbia, or a possession of the United States, or between points in the same States but through a point thereof.

(h) . . . .

(I) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

(j) The term "firefighter" means an employee, the duties of whose

position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) . . . .

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§631. **Age Limits.**

(a) Individuals at least 40 years of age. The prohibitions in this Act (except the provisions of 623(g) of this title) shall be limited to individuals who are at least 40 years of age.

(b) . . . .

© Bona fide executives or high policy makers.

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if such employee is entitled to an immediate from a pension, profit sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in

accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d) ....

§632. **Annual Report to Congress.** [Omitted]

§633. **Federal-State Relationship.** [Omitted]

§633a. **Nondiscrimination on Account of Age in Federal Government Employment**

DISCRIMINATION FOR AGE, RACE, COLOR, CREED, SEX, SOCIAL OR NATIONAL ORIGIN OR SOCIAL POSITION
(29 P.R.L.A. §146)

Any employer who discharges, lays off or discriminates against an employee regarding his salary, wage, pay or remuneration, terms, rank, conditions, or privileges of his/her job, or who fails or refuses to hire or rehire a person, or who limits or classifies his/her employees in any manner which tends to deprive a person of employment opportunities, or to affect his/her status as employee because of his/her age, as defined below, race, color, sex, social or national origin, social condition, political or religious beliefs of the employee or applicant for employment:

(a) shall incur civil liability

(1) for a sum equal to twice the amount of damages sustained by the employee or applicant for employment on account of such action;

(2) or for a sum of not less than one hundred (100) nor more than one thousand (1,000) dollars, at the discretion of the court, if no pecuniary damages are determined;

(3) or twice the amount of the damages sustained if such amount is under the sum of one hundred (100) dollars; and

(b) he shall also be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than one hundred (100) nor more than five hundred (500) dollars, or by imprisonment in jail for a term of not less than thirty (30) nor mores than ninety (90) days, or by both penalties, in the discretion of the court.

Similarly, any employer who commits any of the acts mentioned in the first paragraph of this section relative to a person married to an employee

of his/her company or business, shall be guilty of discriminatory practice and incur the aforementioned civil and penal liability. This provision shall apply to those persons who get married who aspire to employment as well as to those who are already employed by the employer.

Notwithstanding the provisions stated in the preceding paragraph, in those situations in which a clear conflict of functions exists due to the marriage, and which substantially and adversely affects business operations, the employer shall be obligated to make a reasonable adjustment or compromise regarding the functions of the employees or employment aspirants. This practice shall apply to companies or businesses with (50) or more employees.

The aforementioned must be done so as not to affect the right of the employer to establish reasonable regulations concerning the working conditions of married couples employed in the same department, division or physical facility.

The following factors shall be taken into consideration in order to comply with that stipulation: the size of the company's physical facilities and number of employees; its organizational chart, ranking and line of command; its physical needs and the specific problem or difficulties which could be caused by the married couple.

In the judgment passed on civil actions brought under the aforesaid provisions, the court may order the employer to reinstate the employee in his/her job and to cease and desist from the act involved.